Supreme Court, U. S.
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NO. 80-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROSEMARIE C. WOOTERS, ET AL.,

PETITIONERS,

V.

MARY D. JORNLIN, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WERE PETITIONERS DEPRIVED OF ANY PROPERTY INTEREST?

II. WERE PETITIONERS DENIED DUE PROCESS BY THE DEFENDANTS?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

These provisions are set forth verbatim in the Appendix:

Delaware Laws

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New Castle County (NCC) Code

NCC Code §5-1

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STATEMENT OF THE CASE

The plaintiffs are residents of and homeowners of Brookmont Farms, a residential development in New Castle County, Delaware. Defendants, Mary D. Jornlin, Henry J. Folsom, Jr., and Melvin Slawik, have in sequence held the post of County Executive of New Castle County. Defendant Albert W. Madora is the Director of the New Castle County Department of Public Works; defendants Stephen Kowalchuk, Jr., Warren O'Sullivan, and Edward F. Peterson, have sequentially held the post of Director of Development and Licensing of New Castle County Department of Public Works; Thomas Fede is the Chief Building Inspector of New Castle County Department of Public Works and James Cunane, John Dugan, Robert Roberto, and Clifford Turner are Building Inspectors for the New Castle County Department of Public Works; David Biloon is the Director of

Lines and Grades for the New Castle County Department of Public Works.

Brookmont Farms was planned, constructed and offered for sale as new, moderate and low income, single family homes. Prior to plaintiffs' settlements on their homes in Brookmont Farms, the County defendants issued or permitted to be issued certificates of occupancy for each home. Plaintiffs relied upon such certificates of occupancy to indicate that the homes were constructed in compliance with applicable law, but after moving in found numerous nonconformities with the building code. These defects were unknowable. Plaintiffs state that if they had been aware of the defects they would have canceled their Agreements of Sale or taken other action against the builder. The builder now lacks sufficient assets to satisfy the plaintiffs' claims.

The defendants Fede, Cunane, Dugan, Roberto and Turner allegedly either failed to perform the necessary inspections or conducted them without the proper standard of care resulting in the improper issuance of the certificates of occupancy. The defendant Biloon failed to perform the necessary determination of lines or grades, or determined them without using the proper standard of care resulting in the improper issuance of licenses. The defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk, O'Sullivan and Peterson failed to properly supervise the other individual defendants. The defendants Jornlin, Folsom, Slawik, Madora, Kowalchuk and Peterson knowingly permitted the custom and practice of non-existence or inadequate inspections of new housing and accepted, tolerated and condoned this practice.

The homes purchased by the plaintiffs were not in the physical condition

as allegedly represented by the certificates of occupancy and the plaintiffs have expended money unsuccessfully to cure the several construction defects and in meeting extraordinary operating expenses. Additionally, the plaintiffs have suffered less than normal use and enjoyment of their homes and have suffered certain distress, annoyance, inconvenience, and embarrassment because of the defective condition of their homes.

Plaintiffs commenced this action on their own behalf and of all other homeowners of the development seeking damages and injunctive relief under 42 U.S.C. §1983. The County defendants moved to dismiss the Complaint, pursuant to Rule 12(b)(1) and (6), F.R.Civ.P., contending that the Court lacked subject matter jurisdiction and that the Complaint failed to state a claim upon which relief could be granted. The District

Court denied the County defendants' Motion to Dismiss for lack of subject matter jurisdiction but granted the County's Motion to Dismiss for failure to state a claim upon which relief could be granted under 42 U.S.C. §1983, finding that the County defendants violated none of the plaintiffs' Constitutional rights.

As plaintiffs' Complaint was held to fail to state a claim, the facts set forth in their Complaint have been accepted as true and the pleadings considered in the light most favorable to plaintiffs as the non-moving party in this Statement of the Case.

SUMMARY OF ARGUMENT

I. THE STATE STATUTES AND COUNTY ORDINANCES CITED BY PETITIONERS DID NOT CREATE ANY INDIVIDUAL PROPERTY INTERESTS IN PETITIONERS.

II. THE DISTRICT COURT CORRECTLY CONSIDERED THE INTERESTS OF THE PETITIONERS AND THE DEFENDANTS IN DETERMINING NO DENIAL OF DUE PROCESS OCCURRED.

ARGUMENTS

I. THE STATE STATUTES AND COUNTY ORDINANCES CITED BY PETITIONERS DID NOT CREATE ANY INDIVIDUAL PROPERTY INTERESTS IN PETITIONERS.

Plaintiffs' Petition for Writ of Certiorari sets forth that they have been deprived of rights secured to them by the Constitution in violation of 42 U.S.C. §1983. Plaintiffs in their Petition, as they did in the courts below, strive to show precisely the due process which they claim to have been denied but their Petition fails to show that they had a property right which was entitled to due process protection. Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d. 717 (1979).

Plaintiffs do not point to a federal source for the property rights of which they claim they were deprived by the action of the County defendants and indeed it would be difficult for them to do so as this Court has specifically held that

the Constitution does not guarantee access to dwellings of a particular quality. Lindsey v. Norment, 405 U.S. 56, 92 Supr. Ct. 862, 31 L. Ed. 2d 36 (1972).

Plaintiffs claim that certain statutes of Delaware and ordinances of New Castle County give rise to benefits which they have been denied without due process of law. Thus it is necessary to look at those state statutes and rules to determine if the plaintiffs are entitled to the benefits claimed. Goss v. Lopez, 419 U.S. 565, 95 Supr. Ct. 729, 42 L. Ed. 2d 725 (1975).

The state statutes which the plaintiffs point to are 9 Del. C. Part II, Ch. 13 and 16 Del. C. Ch. 83. The first of these deals with the organization of New Castle County government and the second of these statutes deals with county building codes. The court below in its Opinion dealt only with the provisions of Title 9

Del. C. Part II, Ch. 13. This was proper as the officials and their duties described in 16 Del. C. Ch. 83 were absorbed and taken over by the New Castle County Department of Development and Licensing established by 9 Del. C. §1361. [These duties were subsequently transferred from that Department to the Department of Public Works by New Castle County Code §2-66]. The ordinances of New Castle County relied upon by the plaintiffs are those adopting the BOCA Code as the County's Building Code, NCC Code §5-1 and those dealing generally with licensing and licensing appeal, NCC Code §2-44.

The District Court correctly concluded that these statutes as well as these ordinances of New Castle County created no property interest of plaintiffs such that they would have an entitlement to the benefit which they are claiming. See, Board of Regents of State Colleges v. Roth, 408 U.S. 564,

92 Supr. Ct. 2701, 33 L. Ed. 2d 548 (1972).

The benefit which the plaintiffs claim they are entitled to was that the various statutes of Delaware and ordinances of New Castle County cited by them established a system of building permits, inspections, and ultimately a certificate of occupancy for all new residential buildings within the County and that as purchasers of new residential property in the County they were entitled to rely upon such certificates of occupancy as assuring that their respective properties conformed to all the provisions of the New Castle County Building Code, or BOCA Code. Plaintiffs claim that they were deprived of this benefit when the County inspectors by misfeasance or nonfeasance issued certificates of occupancy for their residences when they did not conform to the County Building Code. The District Court ruled and the Court

of Appeals for the Third Circuit agreed that the statutes cited by the plaintiffs failed to establish any entitlement in them to the benefit which they were claiming.

The state statutes asserted by the plaintiffs to be the source of their entitlement to the benefit being claimed clearly fall far short of creating any right in them. Title 9 Del. C. §1361 et seq. is an organizational statute setting forth with some detail the division of duties between the various departments of the New Castle County government which was being reorganized. Title 16 Del. C. Ch. 83 was described by the Delaware Supreme Court as an enabling act, E. I. duPont de Nemours & Co. v. Clark, Del. Supr., 88 A.2d 436 (1952). The status of this statute as an enabling act is clearly borne out by its subsequent amendment by 56 Del. Laws, Ch. 408 which added §8329 expanding the scope of this

enabling act to cover all of New Castle County as well as the remaining two Counties of Delaware. [For reasons not appearing anywhere in the Delaware Code when that Code was revised in 1974, 16 Del. C. §8329 was recodified as 16 Del. C. §7601.] In the Court of Appeals the plaintiffs argued that the Legislature imposed a mandatory duty on the County to enact a building code for rural New Castle County but only a discretionary duty as to the remaining portions of the County and State. However, this argument completely ignored the Delaware Supreme Court's characterization of 16 Del. C. Ch. 83 as enabling legislation.

Plaintiffs have cited the provisions of New Castle County Code §2-44 to build an argument that they were aggrieved by the issuance of the certificates of occupancy and that they would have a right of appeal within ten (10) days of the issuance to appeal if the actions of the

County had not deprived them of notice that they were aggrieved by the issuance.

The weakness of the plaintiffs' argument can readily be seen when reference is made to other provisions of the New Castle County Building Code. New Castle County Code §5-2(h.1) provides in substance that the application for the building permit is to be made by the owner or the owner's designated agent. Thus, a certificate of occupancy is issued by the County not to the persons in the plaintiffs' status but rather to the person in the position of the defendant MR Real Estate Co. Indeed, there is no necessity under the New Castle County Code that the property involved be subject to an agreement of sale at the time of the issuance of the certificate of occupancy. When this fact is considered it is clear that it is merely chance that a particular purchaser would fall within the provisions of New Castle County Code §2-44 at

the time of the issuance of the certificate of occupancy.

The plaintiffs' lack of any entitlement to the benefits which they are claiming from the state statutes and county ordinances is even more pronounced when they attempt to set forth the due process proceedings which they claim has been denied them. Plaintiffs point to New Castle County Code §2-44 and claim that they would have had the right to attack the improper issuance of the certificates of occupancy because they would have been parties aggrieved by them. To reach this point the plaintiffs have to make several assumptions.

First, plaintiffs have to assume that they would have received notice of the issuance within ten (10) days thereof. As noted above, there are no restrictions in the Code as to when the certificates of occupancy could be issued. If a certificate of occupancy is

issued before an agreement of sale is signed then does the eventual purchaser of the property also purchase a right to sue the County under 42 U.S.C. §1983 for a denial of due process which may have occurred before the purchaser even knew of Brookmont Farms?

Second, plaintiffs would have had to have known that the certificates of occupancy were improperly issued before they would have known they were aggrieved parties. The only manner in which they would have known this fact would be by making a thorough inspection of the property or having it thoroughly inspected on their behalf before settlement, or purchase, which is precisely the obligation which they are seeking to shun by placing the duty of such inspections solely upon the County.

There is in reality no procedure by which the entitlement which the plaintiffs

are claiming could be effectively protected since it is a benefit which was never intended to be created by statute or ordinances. As pointed out by the District Court in its Opinion the statutes and ordinances involved speak only of the general welfare; they do not speak of creating any rights in any individuals or property owners or purchasers of property [A-32].

II. THE DISTRICT COURT CORRECTLY CONSIDERED THE INTERESTS OF THE PETITIONERS AND THE DEFENDANTS IN DETERMINING NO DENIAL OF DUE PROCESS OCCURRED.

This Court has set out a three-part test for the determination of cases alleging a denial of due process. There should be a consideration of three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319,335, 96 Supr. Ct. 893,903, 47 L. Ed. 2d 18,33 (1976).

Here, the plaintiffs fall short when consideration of all three factors is made. First, their interest is a misplaced expectation. Rather than protect themselves in the purchase of new residential real estate they absolutely

relied upon the New Castle County government to protect them. As set forth in Part I the benefit being claimed by the plaintiffs cannot be shown to be derived from any statute, legal rule or mutually explicit understanding. Leis v. Flynt, supra.

Second, any deprivation of the plaintiffs' interest is not a result of procedural deficiencies which could be corrected but rather it can be pointed to errors committed by the County officials in the performance of their duties. Even if the County building inspectors had diligently pursued their task, given the time and other limitations imposed upon them, there is still the distinct possibility that violations of the BOCA Code could have existed despite the issuance of a certificate of occupancy. Plaintiffs would be as equally aggrieved by

violations of the BOCA Code resulting from mere negligent oversight as from deliberate misfeasance or nonfeasance as alleged. There are in reality no additional procedural safeguards which could reasonably be constructed to further protect the plaintiffs' interest.

Third, the plaintiffs, in reality, are attempting to construct an argument that the County was a guarantor of their property and that the failure of their property to meet every specification of the BOCA Code amounts to a violation of such guarantee. It is clear from a review of the County's role in this matter that such was not the case. The enabling act authorizing the adoption of a building code was designed to promote the general health and welfare. E. I. duPont de Nemours & Co., supra.

It was intended as a means of raising the general quality of property in the County as well as reducing safety and fire hazards. It is clear from the enabling statute as well as the enacting ordinances that the County was not intended to become a guarantor of new property. The District Court properly looked at the burden which would have been imposed upon the County to undertake such a role both in terms of manpower and commitment of its financial resources and rejected plaintiffs' assertion that such a result was intended by either the Delaware Legislature or County Council.

While plaintiffs allege great financial loss because of the deficiencies in the inspections leading to the certificates of occupancy this Court does not look to the weight of the plaintiffs' concern but rather to the nature of the

plaintiffs' concern to determine initially if they are entitled to Constitutional protection. Board of Regents of State Colleges v. Roth, supra.

When the plaintiffs' Complaint is stripped of its civil rights terminology it is obvious the plaintiffs have done nothing more than allege a tort claim against the County and its employees for faulty inspections before issuance of certificates of occupancy. Such a tort claim does not give rise to a claim under 42 U.S.C. §1983. Paul v. Davis, 424 U.S. 693, 96 Supr. Ct. 1155, 47 L. Ed. 2d 405 (1976).

CONCLUSION

Respondents respectfully request this Honorable Court deny the plaintiffs' Petition for Writ of Certiorari.

Respectfully submitted,

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DELAWARE LAWS

56 Del. Laws, Chapter 408.

AN ACT TO AMEND CHAPTER 83, TITLE 16, DELAWARE CODE, RELATING TO COUNTY BUILDING CODES, PLUMBING CODES, ELECTRICAL CODES AND SIMILAR CODES, AND PROVIDING FOR REASONABLE FEES FOR THE ENFORCEMENT THEREOF.

Be it enacted by the General Assembly of the State of Delaware:

Section 1. Amend Chapter 83, Title 16, Delaware Code by adding thereto a new section to read:

§8329. Promulgation of building, plumbing, electrical and other codes; building permits; fees

The Levy Courts of the several counties and the County Council of New Castle County may adopt and enforce building codes, plumbing codes, electrical codes or other similar codes, as a basis for determining whether or not

building permits shall be issued. The said Levy Courts and County Council may charge reasonable fees for the enforcement of said code.

Approved July 26, 1968.

NEW CASTLE COUNTY (NCC) CODE

Sec. 5-1. Building code--Adopted.

Certain documents are on file in the office of the clerk of county council being marked and designated as the BOCA Basic Building Code 1978, Seventh Edition, as published by the Building Officials Conference of America, Inc., be and are hereby adopted as the building code of the county, for the control of buildings and structures as herein provided. All of the provisions, penalties, conditions and terms of the BOCA Basic Building Code 1978, Seventh Edition, are hereby referred to, adopted and made a part hereof, as if fully set

out in this section, with the additions, insertions, deletions and changes prescribed in section 5-2.

NCC Code §5-2(h.1) 112.3. Add a new subsection as follows:

112.3. BY WHOM APPLICATION IS MADE. Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either, or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant, and of the responsible officers, if the owner or

lessee is a corporate body, shall be stated in the application. If the applicant is a corporation, partnership, joint venture or any entity other than a natural person, the principals of the applicant shall be disclosed and at least one of the principals shall be a signatory to the application for a permit. A principal for purposes of this section shall be defined as a director and/or officer and/or shareholder of a corporation; or anyone with an interest of five (5) per cent or greater in a partnership or joint venture.